UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

THE STATE OF NEW YORK and THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Plaintiffs,

-against-

THE UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Civil Action No. 7:10-CV-1495

District Court Judge: Norman A. Mordue

Magistrate Judge: George H. Lowe

Plaintiffs, by their attorney, Andrew M. Cuomo, Attorney General of the State of New York, allege:

NATURE OF THE ACTION

1. This is a civil action brought against Defendant the United States of America pursuant to Section 7002 of the Resource Conservation and Recovery Act ("RCRA" or "Act"), 42 U.S.C § 6972, for injunctive relief for violations of RCRA at Fort Drum, related to the discharge of JP-8 jet fuel by the United States Army ("the Army") into the environment.

2. Plaintiffs seeks an injunction ordering the Army to comply with a Consent Decree agreed to between the parties, settling the Army's past and ongoing violations of RCRA.

JURISDICTION AND VENUE

3. The Court has jurisdiction of this action pursuant to 42 U.S.C. § 6972(a)(1)(B), which authorizes "any person [to] commence a civil action on his own behalf . . . against any person, including the United States . . . who has contributed or who is contributing to the past or

present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment . . .”

4. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b) and 1395 because the Army owns and operates Fort Drum located in this judicial district.

NOTICE

5. On May 5, 2010, Plaintiffs provided notice to the Secretary of the Army of the violations alleged herein. A copy of the notice of violation was provided to, among others, the Administrator of the United States Environmental Protection Agency ("EPA"), the EPA Region 2 Director, the United States Attorney General, and the Commissioner of the New York State Department of Environmental Conservation.

6. The 90-day period established in Section 7002(b)(2)(A) of the Act, 42 U.S.C. § 6972(b)(2)(A), between the notice provided by Plaintiffs and the commencement of this civil action, has elapsed.

PARTIES

7. Plaintiff the State of New York is a body politic and sovereign entity.

8. Plaintiff New York State Department of Environmental Conservation ("DEC") is an administrative agency of the State of New York, authorized to enforce and regulate all discharges of hazardous and solid waste into waters of the States pursuant to N.Y. Envtl. Conservation Law ("ECL") Article 17.

9. Both the State of New York and DEC are "persons" under RCRA § 1004(15), 42 U.S.C. § 6903(15).

10. Defendant the United States of America is a sovereign and body politic, and includes all of its departments and agencies, including the Department of Defense. The Army is

a branch of the Department of Defense, and owns and manages the Fort Drum Military Installation (commonly called "Fort Drum") and all buildings, appurtenances, and other facilities and installations located thereon. Fort Drum is a military reservation located in the Town of LeRay, Jefferson County, New York.

STATUTORY AND REGULATORY BACKGROUND

RCRA

11. RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste. One of its primary purposes is to ensure the proper treatment, storage, and disposal of hazardous waste "so as to minimize the present and future threat to human health and the environment." 42 U.S.C. § 6902(b).

12. The RCRA citizens' suit provision permits the commencement of a civil suit "against any person," including the United States, for, among other things, "contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment . . . ." 42 U.S.C. § 6972(a)(1)(B). The requirement that waste "may present an imminent . . . endangerment" is directed at harm that threatens to occur in the immediate future.

13. RCRA further provides that all branches and/or agencies of the Federal Government "engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all . . . State . . . requirements, both substantive and procedural . . . respecting control and abatement of solid waste or hazardous waste disposal." 42 U.S.C. § 6961(a).

14. RCRA defines "solid waste" as

> any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows . . .

42 U.S.C. § 6903(27).

15. The accidental discharge of petroleum into groundwater and/or soils from a storage facility (whether above or below ground) constitutes an "imminent and substantial endangerment to the health or environment" within the meaning of RCRA § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B).

New York State Environmental Conservation Law ("ECL") Article 17

16. Pursuant to ECL Article 17, DEC is authorized to prevent the discharge of pollutants into the waters of the New York State. Specifically, ECL § 17-0501 makes it unlawful for "any person, directly or indirectly, to throw, drain, run, or otherwise discharge into [waters of the state] organic or inorganic matter that shall cause or contribute to a condition in contravention of the standards" adopted by DEC.

17. The term "waters of the state" is defined to include springs, wells, and "any other bodies of surface or underground water . . . which is wholly or partially within or bordering the state or within its jurisdiction." ECL § 17-0105(2).

18. DEC provides numeric water quality standards for waters of the state, including those for petroleum byproducts, such as benzene and toluene. See 6 New York Code, Rules, and Regulations ("NYCRR") Part 703.5, tbl. 1.

19. Additionally, under ECL § 17-0701, it is unlawful for any person to discharge a waste -- such as petroleum -- into waters of the state without a permit. Thus, any person that

either causes a violation of a state water quality standard related to petroleum byproducts or discharges a waste into state waters without a permit is in violation of ECL Article 17.

20. DEC is authorized pursuant to ECL § 17-1927 to "cause to be instituted in a court of competent jurisdiction proceedings to compel compliance with" ECL §§ 17-0105 and 7-0701.

21. Further, "[i]t shall be the duty of the Attorney General upon the request of the commissioner [of DEC] to bring an action for an injunction against any person violating" ECL §§ 17-0105 and 7-0701.

FACTUAL BACKGROUND APPLICABLE TO ALL CAUSES OF ACTION

22. The Army owns and operates a petroleum storage and distribution facility (commonly called the “Oasis fuel system”) located at Fort Drum.

23. The Oasis fuel system includes two 110,000 gallon above-ground storage tanks and a hydrant fuel system that includes pumps and underground pipes for distribution of aviation fuel at Fort Drum.

22. In April 2006, the Army reported to DEC a discharge of JP-8 jet fuel from Service Pit No. 6 at the northern end of the Oasis fuel system.

23. This spill occurred continuously from sometime in 2003 until April 2006, and resulted in approximately 493,000 gallons of JP-8 fuel discharging into soils and groundwater underlying the facility.

24. The discharge resulted in the area surrounding the Oasis fuel system being contaminated in three distinct ways: (i) by creating a layer of petroleum, known as light non-aqueous phase liquids (“LNAPL”), that floats within or on top of the groundwater underlying the

facility; (ii) by creating a dissolved phase plume within the groundwater; and (iii) by contaminating soils in and around the facility.

25. The discharged jet fuel, even to the extent recovered, will no longer be a useful material and thus is a "solid waste" within the meaning of 42 U.S.C. § 6903(27).

26. Sampling of groundwater underlying the Oasis fuel system shows it to be contaminated with petroleum in concentrations exceeding New York State drinking water standards.

27. Petroleum continues to be discharged from contaminated soils into groundwater underlying the facility.

THE ARMY'S AGREEMENT TO ENTER INTO A CONSENT DECREE

28. Since January 2007, the Army has undertaken and/or agreed to undertake several interim remedial measures to recover LNAPL from below the Oasis fuel system.

29. On December 2, 1010, the Army entered into a Consent Decree with Plaintiffs, in which it agreed to meet certain procedural and substantive requirements concerning the completion of LNAPL removal from the groundwater at the site, and implementation of all necessary remedial actions to address the dissolved phase plume from groundwater and contaminated soil at the site.

30. The Army has agreed to implement these measures required under the Consent Decree to avoid the costs and uncertainties of litigation and to improve the environment.

FIRST CLAIM FOR RELIEF
("IMMINENT AND SUBSTANTIAL ENDANGERMENT")

29. The Army's past and continuing discharge of petroleum from the Oasis fuel system into groundwater and soils underlying such facility constitutes an "imminent and

substantial endangerment to the health and the environment" within the meaning of RCRA § 7002(a)(1)(B), 42 U.S.C. 6972(a)(1)(B).

30. Pursuant to RCRA § 7002(a), 42 U.S.C. § 6972(a), the Army is liable for injunctive relief requiring it to implement all measures to (i) ensure that the groundwater underlying the Oasis fuel system meets all applicable water quality standards, (ii) that all contaminated soils are removed from the site, and (iii) that the Oasis fuel system meets all applicable requirements concerning bulk petroleum storage.

SECOND CLAIM FOR RELIEF
(VIOLATION OF ECL)

31. The Army's past and continuing discharge of petroleum from the Oasis fuel system into groundwater and soils underlying such facility is contributing to contravention of the water quality standards adopted by DEC in violation of ECL § 17-0501, and constitutes an unpermitted discharge of waste under ECL § 17-0701.

32. Pursuant to ECL §§ 71-1927 and 1931, the Army is liable for injunctive relief requiring it to implement all measures to (i) ensure that the groundwater underlying the Oasis fuel system meets all applicable water quality standards, (ii) that all contaminated soils are removed from the site, and (iii) that the Oasis fuel system meets all applicable requirements concerning bulk petroleum storage.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment against the Army:

A. Requiring the Army to comply with the requirements of the Consent Decree agreed to by the parties, as relief for the Army's violations of RCRA, as set forth in the first cause of action, and ECL Article 17, as set forth in the second cause of action; and

B. Such other and further relief as the Court deems just and proper.

Dated: Albany, New York
December 10, 2010

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